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CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Samir Shibani,)	No. CV 00-401-PHX-PGR
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
)	
Intel Corporation, et. al,)	
)	
Defendant.)	
)	

This is an action involving in part a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 et seq. Pending before this Court is defendant Intel Corporation's Motion for Summary Judgment (**Doc. 126**) on Plaintiff's Disparate Impact Claim. Having reviewed the parties' memoranda in light of the record as a whole, the Court finds that there are no genuine issues of material fact and that the defendant is entitled to entry of judgment in its favor as a matter of law pursuant to Fed. R. Civ. P. 56 on the plaintiff's disparate impact claim.

PROCEDURAL HISTORY

Mr. Shibani ("Shibani"), the plaintiff, filed his administrative charge of discrimination on March 11, 1999 with the Equal

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1 Employment Opportunity Commission ("EEOC"). The EEOC issued Shibani
2 a notice of the right to sue letter on June 29, 1999. Shibani filed
3 the current action in the United States District Court for the
4 District of Oregon on September 20, 1999. The case was transferred
5 to United States District Court for the District of Arizona in
6 early 2000. On July 23, 2001, defendant Intel Corporation
7 ("Intel") filed this Motion for Summary Judgment on the plaintiff's
8 disparate impact claim, claiming Shibani failed to timely exhaust
9 his administrative remedies within 300 days after his last
10 performance evaluation.

11 **BACKGROUND**

12 Shibani worked for Intel from April 1984 until January 3, 1999,
13 as a senior facilities engineer. Shibani was terminated on January
14 3, 1999. He was 53 years old at the time of his termination.
15 During Shibani's employment with Intel he received annual
16 performance reviews.

17 One of the criteria in the performance reviews was performance
18 trend. This trend measured an individual's improvement in his job
19 performance in comparison to other employees within the group. One
20 could trend faster, the same, or slower than other individuals.
21 Two consecutive slower ratings resulted in that individual being
22 barred from participating in Intel's redeployment program. The
23 redeployment program operated to allow employees, whose jobs had
24 been eliminated, to find other employment within Intel.

25 Shibani received slower performance ratings on his April 1,
26 1996, April 3, 1997, and April 6, 1998 job reviews. On September
27 16, 1998, Shibani received written notice that his position was
28 being eliminated. Shibani alleges this is the first time he became

1 aware of Intel's policy regarding two consecutive slower ratings
2 barring him from the redeployment program. Shibani alleges that he
3 inquired of Intel management in 1997 what consequences a slower
4 rating would have and the manager answered it would not be a
5 problem.

6 Shibani maintains that the combination of Intel's performance
7 trend ratings coupled with the redeployment program unfairly
8 discriminate against older workers. Shibani contends that it is
9 easier for younger, inexperienced workers to improve faster than
10 older workers because the older workers have already attained a
11 high level of experience so it would be harder for them to improve
12 at the same rate as an inexperienced worker. This policy would
13 tend to give a greater number of slower ratings to older employees
14 assuming they have reached a plateau in experience. When this
15 policy is enforced through barring the slower workers from the
16 redeployment program it is alleged that it violates ADEA.

17 **DISCUSSION**

18 **A. Standard of Review**

19 In analyzing a Motion for Summary Judgment the motion shall be
20 granted if there is no genuine issue as to any material fact and
21 the moving party is entitled to a judgment as a matter of law.
22 Fed. R. Civ. P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317
23 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The
24 party moving for summary judgment bears the initial burden of
25 production to demonstrate that the required standards of Rule 56(c)
26 have been met. *DeHorney v. Bank of America Nat. Trust and Sav.*,
27 879 F.2d 459 (9th Cir. 1989). If the moving party fails to meet
28

1 the burden, summary judgment cannot be granted. *Celotex*, 477 U.S.
2 at 322.

3 **B. ADEA Requires Filing Within 300 Days of the Alleged**
4 **Discriminatory Act.**

5 ADEA requires that charges alleging unlawful discrimination be
6 filed within 300 days after the alleged unlawful practice occurred.
7 29 U.S.C. § 626(d)(2). The court must first identify precisely the
8 unlawful employment practice which the plaintiff claims was
9 discriminatory. *Deleware State College v. Ricks*, 449 U.S. 250, 257
10 (1980).¹ In *Ricks*, the plaintiff filed a Title VII discrimination
11 claim after he was denied tenure and ultimately terminated from his
12 teaching position at the college. *Id.* at 252. The claim was
13 dismissed as untimely because it was not filed within 180 days of
14 the alleged discriminatory act.²

15 In this case, Shiban filed the charge of discrimination on
16 March 11, 1999. Accordingly, to timely exhaust his administrative
17 remedies within 300 days of the discriminatory act, the unlawful
18 practice must not have occurred earlier than May 16, 1998. The
19 Court concludes as a matter of law that the last discriminatory act
20 occurred on April 6, 1998, the day of the last performance review.
21 This is more than 300 days, so the charge is time barred.

22 **C. Continuing Violations**

23 "Under the continuing violation doctrine, 'a systematic policy
24 of discrimination is actionable even if some or all of the events

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26 ¹*Ricks* is a Title VII case; however, the filing requirements for claims are
analogous to the ADEA.

27 ²In dual filing states, such as Arizona, where the state has a statute
28 prohibiting discrimination based on age the statute of limitations is 300 days
not 180.

1 evidencing its inception occurred prior to the limitations
2 period.'" *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir.
3 1990)(citations omitted). The doctrine is applied because the
4 continuing discrimination violates the employee's rights up to the
5 time that falls within the applicable statute of limitations.
6 *E.E.O.C. v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 644
7 (9th Cir. 1992).

8 Intel attempts to limit Shibana's claim of discrimination to
9 one claim. Intel maintains that Shibana only states the performance
10 evaluation was discriminatory. Intel seeks to exclude any later
11 acts which might not be time barred, such as notice of the
12 allegedly discriminatory redeployment program. Similarly in *Ricks*,
13 the Supreme Court barred the plaintiff's claims of continuing
14 violations.

15 In *Ricks*, the plaintiff tried to allege in oral argument that
16 the termination was discriminatory in an attempt to extend the
17 commencement of the limitations. However, the Complaint never
18 alleged this fact; it only said the denial of tenure was
19 discriminatory. The Supreme Court noted the termination was a
20 consequence of the denial of tenure. *Ricks*, 449 U.S. at 258.
21 Therefore, the termination would not be a continuing violation.
22 The commencement of running the limitations would begin with the
23 denial of tenure not the termination that occurred later.

24 In this action, Shibana alleges the performance reviews were
25 discriminatory. Barring Shibana from participating in the
26 redeployment program is not a separate discriminatory act for the
27 purpose of the disparate impact claim; it is only a consequence of
28 his trending slower performance review. Therefore the running of

1 the statute of limitations began on April 6, 1998, the date of the
2 last performance review.

3 **D. Standard of Notice**

4 In ADEA discrimination suits, determining when the statute of
5 limitations begins to run centers on the date when the employee has
6 notice of the unlawful act. *Aronsen v. Crown Zellerbach*, 662 F.2d
7 584, 593 (9th Cir. 1981). The last discriminatory act was
8 communicated to Shiban on April 6, 1998. The running of the
9 statute of limitations would commence on this date. ADEA's filing
10 period does not begin to run until the employee knows, or as a
11 reasonable person should know, that the employer has made an
12 unlawful discriminatory practice. See *Id.*

13 In *Ricks*, the Supreme Court noted that the statute of
14 limitations commenced to run when the discriminatory act, the
15 denial of tenure, was made and communicated to the plaintiff.
16 *Ricks*, 449 U.S. at 258. The notice constituted the official letter
17 to the plaintiff notifying him that his tenure was denied.³ The
18 termination was just a consequence of the denial of tenure and was
19 not itself alleged to be discriminatory. The limitations would not
20 commence at termination even if it was later because it was not a
21 discriminatory act. *Id.*

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25 ³The court in *Ricks*, makes some note of the fact that the plaintiff
26 received an official letter and that several committees had made it their final
27 decision to deny tenure. The court seems to indicate that if the denial of
28 tenure was tentative, the commencement of the running of limitations would have
tollled until it was final. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001)
(holding notice of wrongful act commences the running). In the present action,
Shiban received a final, not a tentative review of his trending slower
performance on April 6, 1998.

1 In the present action, Shibana received notice of the
2 discriminatory act at his April 6, 1998 performance review.⁴ At
3 this review, Shibana is told he has received his third trending
4 slower rating. The fact that Shibana maintains he did not become
5 aware of the discriminatory effect of the performance reviews until
6 he was notified he was unavailable for redeployment only goes to
7 the issue of his termination. The termination is only a
8 consequence of the performance review; therefore, it is not a
9 separate discriminatory act. The last discriminatory act was the
10 performance review of April 6, 1998, which was communicated to the
11 plaintiff on that date.

12 **E. Tolling of Statute of Limitations**


13 The plaintiff asserts that the statute of limitations should
14 be tolled until September 16, 1998, if this Court finds the statute
15 of limitations to have commenced at an earlier date. Equitable
16 tolling focuses on the plaintiff's excusable ignorance. *Funk v.*
17 *Sperry Corp.*, 842 F.2d 1129, 1134 (9th Cir. 1988). Factors to
18 consider in granting equitable tolling may include lack of actual
19 or constructive notice. *Abbott v. Moore Business Forms, Inc.*, 439
20 F. Supp. 643, 646 (D.N.H. 1977) [cited by *Naton v. Bank of*
21 *California*, 649 F.2d 691, 696 (9th Cir. 1981)]. In this case,
22 Shibana received actual notice of the discriminatory act at the time
23 of the performance review, dated April 6, 1998. There is no lack

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25 ⁴Intel alleges that Shibana's affidavit claiming lack of knowledge of the
26 discriminatory nature of the reviews until the Summer of 2000 is in direct
27 conflict with his earlier testimony and prior depositions. Further, Intel cites
28 *Burrell v. Star Nursery, Inc.*, 170 F.3d 941, 954 (9th Cir. 1999), stating the
court cannot consider the affidavit because it conflicts with earlier testimony.
However, *Burrell* is distinguishable from this action because it is unclear
whether the earlier testimony is in clear conflict with the affidavit.

1 of notice so the statute of limitations cannot be tolled to a later
2 date. Therefore,

3 IT IS ORDERED that defendant Intel's Motion for Summary
4 Judgment on Plaintiff's Disparate Impact Claim (Doc. 126) is
5 GRANTED.

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7 DATED this 14th day of March, 2002.

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10 Paul G. Rosenblatt
11 United States District Judge
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